THE ENVIRONMENTAL LAW DIVISION
BULLETIN

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Editor's Note

This edition of the Bulletin includes two attachments. The first is an ELD Bulletin reader survey. Please take a few moments to complete the survey and return it to us. The answers provided will assist us in our continual effort to make the Bulletin a useful addition to your legal resources.

The second attachment is a copy of the letter sent by U.S. Environmental Protection Agency Administrator, Carol Browner, to the state of Missouri confirming that Resource Conservation and Recovery Act (RCRA) permits are not required at Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response actions. The letter is the result of a dispute resolution proceeding invoked at the former Weldon Springs Ordnance Works (WSOW) installation in Missouri. WSOW is a National Priorities List (NPL) site. The Army's position is that all CERCLA response actions, whether at NPL or non-NPL sites, are exempt from permit requirements pursuant to CERCLA §121(e)(1). CERCLA, 42 U.S.C. §9621(e)(1), (1986).

RCRA Corrective Action and Closure and CERCLA Coordination - MAJ Anderson-Lloyd

On 24 September 1996, at the U.S. Environmental Protection Agency's (USEPA) National RCRA Program Meeting, Steven A. Herman and Elliott P. Laws signed a memorandum entitled "Coordination Between RCRA (Resource Conservation and Recovery Act) Corrective Action and Closure and CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) Site Activities" (memorandum). Mr. Herman is the Assistant Administrator, Office of Enforcement and Compliance Assurance, and Mr. Laws is the Assistant Administrator, Office of Solid Waste and Emergency Response. This guidance memorandum addresses three areas: acceptance of decisions made in remedial programs; deferral of activities and coordination between programs; and, coordination of specific standards and requirements for closure of RCRA regulated units with other cleanup activities. The stated purpose of the guidance is to assist in eliminating duplication in the cleanup effort, to streamline cleanup processes, and to build effective relationships with states and tribes.

In addition to the guidance offered in the memorandum, USEPA has two other RCRA and CERCLA integration initiatives that are intended to supplement this policy. In the first initiative, USEPA is coordinating with states and Federal agencies through the interagency Lead Regulator Workgroup to provide guidance and to identify options for integration and coordination when cleanup authorities overlap at Federal facilities. Second, USEPA requested comment on the integration of RCRA/CERCLA activities in the Advanced Notice of Proposed Rulemaking - Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities, 61 Fed. Reg. 19,432 (1996).

In the memorandum, USEPA asserts that cleanups conducted generally under either RCRA or CERCLA will satisfy the substantive requirements of the other program. Site managers are encouraged to defer cleanup requirements from one program to the other, avoiding the duplication of studies and remedial activities. When making the deferral decision, USEPA stresses that the focus should be on the final results of the remedial activities. Different implementation approaches in programs should not prevent deferral when the fundamental purpose and objectives are the same.

As one method of deferral, USEPA describes the deletion policy that allows the removal of sites from the National Priority List with deferral of the site cleanup to RCRA corrective action. USEPA cautions, however, that the deletion policy does not pertain to Federal facilities. Instead, interagency agreements may operate to eliminate duplication of effort at Federal facilities. The Lead Regulator Workgroup is expected to address the more specific coordination of oversight and the deferral from one program to another at Federal facilities.

Although it is USEPA's policy to clean up facilities under RCRA when both RCRA and CERCLA apply, USEPA recognizes that in some circumstances it may be more appropriate for the CERCLA program to take the lead. In these instances, independent RCRA action may not be necessary due to the protection afforded by the CERCLA action. Alternatively, there may not be actual deferral to CERCLA but the RCRA permit may defer to the CERCLA document or incorporate the decision document into the permit.

Coordination between the programs without full deferral is expressed by USEPA as often the most appropriate solution. The memorandum describes some options for coordination between programs but again cautions that the options may be different for Federal facilities due to the prescriptive requirements of CERCLA §120. CERCLA, 42 U.S.C. §9620 (1992). The memorandum promises further guidance on coordination options for Federal facilities from the Lead Regulator Workgroup.

The memorandum also considers the difficult issue of coordinating the closure of RCRA units with other cleanup activities. The dual regulatory structure for RCRA closure and other cleanup activities under CERCLA or RCRA results in inconsistent cleanup levels applied to site-wide cleanup and the removal and decontamination (clean closure) of a unit on the site. Clean closure standards are often at background levels while other cleanup levels are at higher, risk-based levels. USEPA announces in this memo a change in policy that, consistent with the use of risk-based standards for cleanup activities, fate and transport models may be used to establish risk-based levels for clean closure standards.

USEPA plans to publish this policy change on risk-based clean closure in the Federal Register and is developing guidance on modeling for the clean closure performance standards. No time frame has been given for publication of the Federal facility guidance from the Lead Regulator Workgroup.

DID YOU KNOW? . . .71% OF THE EARTH'S SURFACE IS COVERED BY WATER.

Significant Court Ruling on Historic Preservation Requirements - MAJ Mayfield

The amount of preservation required under the National Historic Preservation Act (NHPA) was recently the focus of a lawsuit against the Commander, Walter Reed Army Medical Center. National Trust for Historic Preservation v. Major General Ronald R. Blanck, No. 94-1091, slip op. (D.D.C. Sept. 13, 1996). The plaintiffs argued that §110 of the NHPA creates a substantive duty for Federal agencies to preserve historic buildings listed on the National Register of Historic Places.

The Army responded that the NHPA contains only procedural requirements that apply to Federal actions likely to affect historic properties adversely. On 13 September 1996, the Federal District Court for the District of Columbia issued an opinion agreeing that §110 does not establish any preservation requirements independent of those already contemplated in the procedural provisions of the Act. The court then ruled that the Army had complied with the procedural preservation mandates by adopting and implementing a Cultural Resource Management Plan. This opinion, the first to squarely address any preservation requirements of §110, will undoubtedly ignite significant controversy and must be read carefully by Army environmental staff and lawyers to ensure that we continue to preserve our historic buildings/structures in accordance with legal standards.

In National Trust, the plaintiffs sued Walter Reed, alleging that it had failed to adequately maintain numerous historic buildings/structures within the National Park Seminary Historic District, located at Walter Reed's Forest Glen Annex in Silver Spring, Maryland. The Army acquired the Forest Glen Annex in 1942 and used it mainly as an auxiliary service, support, and research area. In 1967, Walter Reed proposed demolishing the old, costly buildings. This proposal alarmed local citizens, who took the necessary steps to have the Historic District placed on the National Registry of Historic Places in 1972. From 1972 until today, Walter Reed gradually stopped using the majority of the historic buildings, and periodically considered excessing the property after the Historic District began to consume a disproportionate amount of limited maintenance funds. Meanwhile, the structural integrity of the historic buildings steadily declined due to reduced or deferred maintenance efforts. The plaintiffs brought the lawsuit seeking a judicial order requiring the Army to repair the Historic District to its 1972 condition.

The court, while sympathetic to the plaintiffs' concerns over the fate of Forest Glen, found that §110 did not contain substantive preservation requirements authorizing it to order the Army to restore the District to a "pre-neglect" condition. The court recognized that the language of §110(a)(1) superficially appears to direct Federal agencies to preserve historic buildings/structures under their control, regardless of cost, but it concluded that the NHPA read as a whole does not.

The NHPA is principally concerned with ensuring that Federal agencies follow strict procedures specified in §106, prior to conducting any "undertaking" that will adversely affect historic properties under their control. The National Trust court concluded that neither the language of §110 nor its legislative history support the interpretation that Congress had established any specific level of preservation that Federal agencies must perform. Rather, the court found that §110 merely represented "an elucidation and extension of the §106 [procedural] process...not its replacement by new and independent substantive obligation of a different kind." The plaintiff's theory of §110's preservation mandates, would, in effect, "replace the heart and soul of the NHPA, requiring an agency to spend money on historic preservation regardless of whether it was engaged in. . . an undertaking."

Despite the lack of a substantive preservation provision, the court made it clear that §110(a)(2) did require Federal agencies to establish a preservation program for the protection of historic properties. Further, such a program must comply with the §110 guidelines, issued by the Secretary of the Interior. Guidelines for Federal Agency Responsibilities Under Section 110 of the National Historic Preservation Act, 53 Fed. Reg. 4727 (Feb. 17, 1988). The Army regulation on historic preservation implements these guidelines and requires Army installations with historic properties to prepare an Historic Preservation Plan (HPP) to meet the Army's §110 obligations. DEP'T OF ARMY, REG. 420-40, HISTORIC PRESERVATION (15 MAY 1984) (AR 420-40).

The court reviewed the requirements of AR 420-40 to determine if Walter Reed had adopted such a plan and moreover, whether the Army had implemented its preservation program concerning the Historic District at Forest Glen. The court found Walter Reed had not prepared an HPP until 1992, when it adopted a Cultural Resource Management Plan (CRMP). From 1984 until 1992, Walter Reed was therefore in violation of the NHPA. Once, adopted, however, the court concluded that Walter Reed had spent substantial sums of money on repair and preservation

activities in accordance with the preservation priorities in the CRMP, and had continued to seek funding to meet its obligations under the CRMP. Accordingly, since the NHPA did not mandate minimal preservation levels, and the Army had reasonably adhered to its Historic Preservation Plan, the court found no authority to order the Army to "turn back the hands of time" for the Historic District.

Army environmental staff and ELSs should not read the opinion in National Trust as minimizing the need to preserve federally-owned historic properties. This case highlights that Army installations must adopt historic preservation plans pursuant to AR 420-40 (or CRMPs pursuant to the soon-to-be published AR 200-4, which will supersede AR 420-40) and strive to follow them. This case also informs all Federal agencies that successful satisfaction of the procedural mandates of §106 may be contingent on the maintenance of certain preservation levels. In today's climate of shrinking budgets, historic preservation may sometimes fall below other priorities; however, we should be mindful of the court's closing comments in National Trust: "While courts may not be authorized under the NHPA to order a recalcitrant agency to rebuild decaying historic treasures, it is their duty to declare what the agency's statutory obligations are and what the agency's procedural course should be."

Section 7(a)(1) Responsibilities Under the Endangered Species Act - MAJ Ayres

Plaintiffs are continuing to scrutinize Federal actions with regard to agency responsibilities under Section 7(a)(1) of the Endangered Species Act of 1973 (ESA). ESA, 16 U.S.C. §1536 (1988). Section 7(a)(1) of the ESA requires Federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section [4 of this Act]." The term "conservation" is defined as meaning "to use and the use of all methods and procedures which are necessary to bring any endangered and threatened species [to recovery]."

While the exact force and breadth of §7(a)(1) remains to be determined, at least one commentor notes that the action-forcing potential of §7(a)(1) has remained largely untested and has further questioned why environmental advocacy groups have not made greater use of §7(a)(1).[1] The desire to determine the action-forcing power of §7(a)(1) seems to have awakened interest among environmental advocacy *groups in several cases.*[2] *Given this continued interest and scrutiny, installation Environmental Law Specialists* (ELSs) should take care to ensure installation activities fulfill the mandates of §7(a)(1). In exercising that care, ELSs should be aware that the courts have found that the mandates of the ESA may have priority over the agencies' primary mission. In one case, the court specifically rejected the notion that §7(a)(1) of the ESA "was not `intended to frustrate the agencies' accomplishment of their primary mission.'"[3] Rather, the Federal agency must accomplish the conservation and recovery responsibility under the ESA but may have "some discretion in ascertaining how best to fulfill the mandate to conserve under §7(a)(1)."[4]

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[1] J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species,* 25 ENVT. L. 1107, 1136 (1995).

[2] *See e.g.,* Concerned Citizens of East Columbus, et al. v. Bobby Peters, et al., No. 4:96-CV-144 (M.D.Ga. 1996).

[3] Pyramid Lake Paiute Tribe of Indians v. United States Department of Navy, 898 F.2d 1410, 1417 (9th Cir. 1990).

[4] *id.* at 1418.

An excellent manner in which to demonstrate the installation's fulfillment of its Section 7(a)(1) responsibilities is the completion and implementation of an Endangered Species Management Plan in consultation with the U.S. Fish and Wildlife Service (FWS).[5] In addition to that measure, installations should ensure that for every major Federal action or construction activity that "may affect" a listed species, and thus where consultation is required, the installation clearly identifies affirmative measures to be taken in conjunction with that activity. These affirmative measures must go beyond mere mitigation measures and should result in the further conservation and recovery of the listed species on the installation. Such measures are advisable given the broad mandates of the §7(a)(1) responsibility and because the §7(a)(2) consultation process is not dispositive of whether the §7(a)(1) responsibility has been met.[6]

DID YOU KNOW? . . .USURPED AND ABANDONED RED-COCKADED WOODPECKER CAVITIES SERVE AS HOMES TO A MULTITUDE OF ANIMALS, INCLUDING OTHER WOODPECKERS, EASTERN BLUEBIRDS, AND EVEN SQUIRRELS AND RACCOONS.

Aggressive RCRA Section 7003 Guidance Coming - CPT Anders

The U.S. Environmental Protection Agency (USEPA) plans to issue new guidance this fall encouraging the USEPA Regions to increase their use of the Resource Conservation and Recovery Act (RCRA) §7003 "imminent hazard" provision. RCRA, 42 U.S.C. §6973 (1984). Increased use of §7003 could be a cause for concern to installations, as the "imminent and substantial endangerment" standard triggering the provision has been interpreted liberally by courts.

Section 7003 authorizes USEPA to bring suit or "take such other action as may be necessary" against any person (including past or present generators, transporters, or treatment, storage or disposal owner/operators) "upon receipt of evidence that the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment." Appropriate Agency action, under its §7003 authority, includes injunctions to halt such activity, or the issuance of an order, the violation or noncompliance of which could result in penalties up to $5,000 per day.

USEPA's current guidance, issued in 1984, provides that "[n]ecessary evidence [to support a §7003 administrative order] may be documentary, testimonial, or physical, and may be obtained from a variety of sources including inspections, investigations, or requests for production of documents under or other data pursuant to RCRA 3007, 3013, or CERCLA 104." *Final Revised Guidance Memorandum on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act (RCRA),* ELI No. AD-607, 12 pages (September 26, 1984). The 1984 guidance describes how only threatened harm is required, not actual harm, in order to support a claim of imminent endangerment under RCRA, and that, while the risk of harm must be imminent, the actual harm need not be. *Id.* A long line of cases liberally construes these concepts. *See,* e.g., United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982), United States v. Vertac, 489 F.Supp. 870, 880-81 (E.D. Ark. 1980).

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[5] DEP'T OF ARMY, REG. 200-3, NATURAL RESOURCES -- LAND, FOREST AND WILDLIFE MANAGEMENT, PARA. 11-5 (28 FEB. 1995).

[6] The mandatory Section 7(a)(2) consultation process with the FWS or the National Marine Fisheries Service (NMFS) can be a useful tool to help an agency identify its Section 7(a)(1) responsibilities. However, the action agency rather than the FWS or NMFS is ultimately responsible for determining and completing its conservation and recovery responsibilities.

Because the 1984 guidance is considered by Agency enforcement officials to be "extremely limited in scope," the new USEPA guidance will emphasize more "risk-based" and "creative" uses of §7003. *Environmental Policy Alert*, Vol. XIII, No. 16 (July 31, 1996). Installations should watch for issuance of the new policy, and be wary of their Regions' subsequent "creative" uses of §7003 authority to compel action under the Regions' discretionary, subjective interpretations of "risk-based."

Enforcement Trend is Individual Over Corporate Defendants - CPT Anders

Earl Devaney, Director of the U.S. Environmental Protection Agency's (USEPA) Office of Criminal Enforcement, Forensics, and Training, agreed with industry representatives that the trend in environmental criminal enforcement is to prosecute individuals, preferably high-level owners and managers, rather than the corporation itself. Devaney made the statement at an American Bar Association conference on 5 September 1996. "In 1991, 80 percent of the criminal defendants were companies. By 1995, 80 percent were individuals, and 20 percent were companies." *Toxics Law Reporter*, Vol. 11, No. 15, p. 437 (September 11, 1996). Devaney fueled industry claims that the targets of environmental crimes are no more than "good people caught in the regulatory quagmire" when he explained that, rather than target "evil polluters," USEPA's enforcement efforts are "beginning to look for the polluter in other forms" such as "non-notifiers." *Id.*

Devaney's confirmation of USEPA's enforcement shift from corporate to individual liability should be taken seriously by installation environmental program and legal personnel. Following USEPA's July publication of its fiscal year 1995 Enforcement and Compliance Assurance Accomplishments Report, public and Congressional critics chided the Agency's decreasing civil and administrative enforcement statistics. As these numbers continue to drop, USEPA's Office of Enforcement and Compliance Assurance will likely become increasingly dependent upon criminal enforcement to illustrate the efficacy of its overall enforcement program. The U.S. District Court for the Western District of Wisconsin, for example, recently sentenced the owner of an underground petroleum storage tank business to 41 months in prison, without parole, for directing employees to dump hazardous waste in violation of the Resource Conservation and Recovery Act. U.S. v. Kelly, No. 95-84-C, (W.D.Wis. Aug. 13, 1996). A Wisconsin Assistant U.S. Attorney believes the sentence was the longest in Wisconsin history for an environmental criminal conviction. *Toxics Law Reporter*, Vol 11, No. 13 (August 28, 1996).

National Defense Authorization Act for Fiscal Year 1997 Passed - Ms. Fedel

On 23 September 1996, President Clinton signed into law the National Defense Authorization Act for Fiscal Year 1997. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996). The Act appropriates $356,916,000 to the Army for environmental restoration. In addition, the Act devolves the Defense Environmental Restoration Account (DERA) to the Services, but maintains the prohibition that DERA funds may only be used to carry out the environmental restoration functions of the Secretaries of the military departments. Funds authorized for DERA shall remain available until they are expended.

The Act amends also the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in several sections that affect Federal facilities. The language "stored for one year or more," has been struck from §120(h)(4)(A), Identification of Uncontaminated Property. CERCLA, 42 U.S.C. §9620(h)(4)(A) (1996). The Act amends the authority to transfer provisions of §120(h)(3) to allow the Services to transfer property before a remedy is in place and
working. CERCLA, 42 U.S.C. §9620(h)(3) (1996). The new provision provides that, for National Priority List (NPL) sites, the Administrator of the U.S. Environmental Protection Agency, with the concurrence of the Governor of the state in which the facility is located, may defer the requirement that the remedy be in place and working where the property is suitable for transfer and there are

adequate assurances that the response action will not be compromised. For non-NPL sites, the Governor of the state may act alone in making this determination. A deferral under this subparagraph shall not increase, diminish, or affect the rights or obligations of the Federal agency with respect to the transferred property.

The first sentence of the section on the application of state law has been amended to read:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) [Federal Agency Hazardous Waste Compliance Docket] when such facilities are not included on the National Priorities List.

The amendments allow also for the deferral of a Federal facility from the NPL where the agency has arranged with the Administrator or state authorities to respond appropriately under authority other than CERCLA to a release or threatened release of a hazardous substance. CERCLA, 42 U.S.C. §9620(d) (1996).

DID YOU KNOW? . . .PRESIDENT ULYSSES GRANT DEDICATED TWO MILLION ACRES IN WYOMING AS YELLOWSTONE NATIONAL PARK IN 1872.

New Natural Resource Damages Executive Order - Ms. Fedel

On 28 August 1996, President Clinton signed an Executive Order (EO) that amends EO 12,580 by delegating new enforcement authorities for natural resource damages (NRDs) to several Federal agencies, including the Department of Defense (DoD). EO 13,016, 61 Fed. Reg. 45,871 (1996). *See also*, EO 12,580, 52 Fed. Reg. 2923 (1987), which delegates authorities vested in the President as established by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601, et seq. (1986).

The new EO delegates authority to the Secretary of Defense to issue abatement action orders pursuant to CERCLA §106(a) where the Secretary determines that there may be an imminent and substantial endangerment to the public health or welfare or to the environment from a release or threat of release affecting either (1) natural resources under the Secretary's trusteeship, or (2) a vessel or facility subject to the Secretary's custody, jurisdiction, or control.
CERCLA, 42 U.S.C. §9606(a) (1986). The EO delegates this authority also to the Secretaries of the Interior, Commerce, Agriculture, and Energy. The Secretaries may only invoke this authority with the concurrence of the Administrator of the U.S. Environmental Protection Agency (USEPA) and only at sites where the USEPA is the lead Federal official for the *oversight* of the response, such as at National Priority List (NPL) sites.

The new EO provides the Secretaries also with expanded authority to enter into settlement negotiations for NRD claims pursuant to CERCLA §122 (except subsection (b)(1)). CERCLA, 42, U.S.C. §9622 (1986).

ELD Bulletin Reader Survey

The purpose of the ELD Bulletin is to assist environmental law attorneys at our installations and MACOMs by providing timely information on new legal developments, issues, and resources. ELD welcomes ideas and comments on ways in which we can improve this service for you. Please take a few moments to complete the following survey to assist us with this effort. You may return the survey by electronic mail to me at fedelsab@otjag.army.mil, or you may send your response to us via facsimile at (703) 696-2940, or DSN 426-2940. Your response can be sent also via U.S. Postal Service to:

U.S. Army Legal Services Agency
Attn: DAJA-EL (Sabrina Fedel)
901 N. Stuart Street, Suite 400
Arlington, VA 22203-1837

Thank you for your assistance and continued support of the ELD Bulletin.

1. What is your level of environmental law experience?

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___ Over three years.

Additional comments:_____

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2. What percentage of your job is concentrated in environmental law?

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8. Do you find citations for references sufficient to access additional necessary information?

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___ No.

If not, why?_____

_____.

United States Environmental Protection Agency
Washington, D.C. 20460

November 1, 1995

David A. Shorr
Director
Missouri Department of Natural Resources
P.O.Box 176
Jefferson City, MO 65102-0176

RE: In the matter of The Former Weldon Spring Ordnance Works Weldon Spring, Missouri
Federal Facility Agreement Docket No. VII-90-F-0033

Dear Mr. Shorr:

Thank you for your letter of September 5, 1995, regarding your decision to elevate the above-captioned depute. Pursuant to the 1990 Federal Facility Agreement (FFA) among the state, the Army, and EPA, this letter is EPA's decision for final resolution of the dispute.

BACKGROUND

On August 9, 1994, Missouri invoked the FFA's dispute resolution procedures regarding the state's authority to require permits for the incinerator, contaminated wastewater treatment, and storm water runoff activities that are described in the draft Final Record of Decision (ROD). On September 7, 1994, the Dispute Resolution Committee elevated the matter to the Senior Executive Committee (SEC). Unable to unanimously resolve the dispute at the SEC level, Bill Rice issued a decision document on August 15, 1995. As provided in the dispute resolution procedures of the FFA, Missouri elected to elevate the Region's decision for resolution.

ANALYSIS

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 121 (e) (1) provides that no federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site. In this case, it is undisputed that the response actions at issue will be constructed entirely within the geographical area considered the NPL site. Nevertheless, we understand Missouri's position to be that because off-site releases and discharges will occur, the state may seek to require the Army to obtain permits. In a February 1, 1995, brief, your Counsel provided EPA with its legal analysis to defend Missouri's position.

Throughout this dispute, the Army has asserted that permits are not required for the subject activities. Specifically, the Army contends that the CERCLA § 121 (e) (1) permit waiver allows lead agencies to commence and continue response actions in accordance with applicable state standards, without subjecting them to the expense and delay associated with applying for, and maintaining, state permits. Furthermore, the Army has stated that it is unwilling to jeopardize its ability to carry out its CERCLA responsibilities by agreeing to apply for a state permit that CERCLA does not require.

The Missouri brief refers to U.S. v. Colorado, 990 F.2d 1565, at 1582 (10th Cir. 1993), where CERCLA § 121 (e) (1) was held not bar enforcement of a state's compliance order issued under that state's EPA-authorized hazardous waste law. Missouri concludes from that ruling that CERCLA § 121 (e)(1) does not bar Missouri from enforcing its laws through its permitting requirements, including Missouri law authorized by EPA in lieu of RCRA, the Clean Air Act, and the Clean Water Act.

However, U.S. v. Colorado addresses only enforcement of state law outside the CERCLA process. It does not address the meaning of "on-site" under CERCLA § 121(e)(1), and what permits are required under CERCLA.

Similarly, Missouri's brief states that the National Contingency Plan (NCP) definition at 40 CFR § 300.400(e) (2) of what constitutes "on-site" is indeterminate, and that the Court of Appeals for the District of Columbia Circuit has concluded only that the regulation on its face in not unlawful. Ohio v. U.S. EPA, 997 F.2d 1520, at 1549 (D.C. Cir. 1993). Missouri contends that what constitutes "on-site" in EPA's view is overbroad and that the response actions under the selected

remedy will inevitably result in extended off-site discharges beyond the "on-site" area, and thus require state permits.

Nothing in the statutory language requires that substances discharged or released from response action on-site must remain entirely on-site for the actions to qualify for the permit exemption. EPA has long view response actions that may have discharges or releases which subsequently migrate beyond site boundaries as qualifying for the CERCLA 121 (e) (1) exemption. This position was clearly stated in the preamble to the 1988 NCP proposal (see 53 FR at 51407 (December 21, 1988)), when EPA stated that:

`on-site' further includes situations where the remedial activity occurs entirely on-site but the effect of such activity cannot be strictly limited to the site. For example, a direct discharge of CERCLA wastewater would be an on-site activity if the receiving water body is in the area of contamination or is in very close proximity to the site, even if the water flows off-site.

This interpretation was not changed in the preamble to the Final NCP, where EPA cities an example of an on-site response action exempt from permit requirements, an incinerator built on upland as a remedy for contamination located in a lowland marshy area 55 FR 8666 at 8689 (March 8, 1990). Moreover, even though the court in Ohio v. EPA does not directly reach the current question, it reference EPA's incinerator example to show why the NCP definition of on-site is not unreasonable on its face.

Therefore, EPA interprets CERCLA section 121 (e) (1) and the corresponding provision of the NCP (300.400(e) (1) as exempting response action conducted entirely on-site even if the actions involve discharges or emissions that result in some subsequent migration of contaminant beyond the site boundaries. We believe this interpretation best serves the purpose of CERCLA section 121(e) (1); namely, that it avoids redundant procedural permitting steps that could delay cleanups. Furthermore, since some off-site migration is likely to occur in virtually all cases where there is an on-site discharge or emission, adopting the state's interpretation would greatly narrow the kinds of permits to which the exemption applies, a result I do not think is consistent with the intent of Congress. The legislative history of the Superfund Amendments and Reauthorization Act of 1986 shows that an earlier version of the Bill would have required permits to be obtained for on-site actions under certain specified laws, including the Clean Air Act and the Clean Water Act. This requirement was eliminated in the conference committee in favor of a blanket waiver. Since Congress clearly chose to exempt on-site actions from permits specifically under these Acts, an interpretation that effectively required permits under these Acts in most or all cases, would be inconsistent with the intent of Congress.

Last, the brief states that Missouri citizens are entitled to the same notice and opportunity for public hearing and comment on federal activities at the site as Missouri provides for response activities involving the state.

Missouri law may indeed provide different public involvement mechanisms than those provided by CERCLA and the NCP. However, so long as the Army fulfills CERCLA and related federal requirements, the Army will be providing a full and fair opportunity for public participation. For example, the Army has provided the public hearing and comment period at the Proposed Plan stage. Additionally, consistent with EPA' Strategy for hazardous Waste Minimization and Combustion, EPA intends to allow further opportunity for public participation while the incinerator is designed and constructed, including public notice of the trail burn plan and opportunity for local citizens to participate during the risk assessment process.

CONCLUSION

I affirm Region VII's decision. The incinerator contaminated wastewater treatment, and storm water runoff activities are on-site activities within the meaning of CERCLA
§ 121 (e) (1) and the NCP 40 CFR § 300.400(e), and, therefore state permits are not required. Accordingly, the Draft Final Record of Decision will not require state permits for those activities.

Sincerely

/s/
Carol M. Browner